Risk, Security and International Law

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There is a strong intersection between risk, security and the law. Legal systems serve as an important way that risk – be it business risk or political risk – can be mitigated. In the broadest terms (and not always empirically true) legal processes remove power differentials to allow the weak to get recourse from the resource rich and powerful. The law is, however, far more effective at regulating financial contracts or measures affecting individuals than it is regulating the behaviour of states parties in the international system, where relative scale and power matter. International law runs inadvertently to one of the key debates in international relations: that of the primacy of state sovereignty. For intergovernmental organisations, such as the EU, states voluntary cede an element of their sovereignty in order to bind in other states. They do so because they calculate they have more to gain from this voluntary pooling than they do from retaining that piece of sovereignty. Outside of this type of voluntary arrangement, states have been very reluctant to subject themselves to the full force of international law as it relates to the conduct of their armed forces or intelligence agencies, for example. All legal systems rely upon the authority of the court, and the ability of the court to impose sanctions on transgressing parties. This is why power and influence matter in international law: capable (and therefore powerful) states are able to resist or ignore international law, and to ignore any sanction that might follow. Less powerful states are less able to do so. The strength of very capable nations – and the United States provides the key example for this in the chapter – have such latent strength that they are able to impose their domestic law upon third countries: extraterritorialising their legal system. This chapter explores extraterritorialisation in a good level of detail due to the importance this concept is beginning to play in the international

system, and can be foreseen to do so into the medium term. This chapter is divided into two main sections, covering firstly how we might choose to reframe political risk and secondly, an understanding of how law and political power intersects with international security.

Political Risk

The world 'is an increasingly dangerous and complicated place'. So has started every western government and transnational articulation of strategy and threat in the last twenty years, including the most recent Strategic Defence and Security Review in the UK (HM Government , 2015). And we can certainly say that since 1989 the threat horizon for NATO countries has become busier, but not necessarily 'more dangerous'. After all, contemporary threats are going to have to be working quite hard to meet the danger, in absolute terms, that was present with a potential exchange of nuclear weapons during the Cold War. And that kind of threat seems to currently exist in a way that requires the monitoring and containment of nations like North Korea, of engagement and mitigation plans in the case of Pakistan, and engagement and diplomacy in the cases of Iran and Russia. The attacks on Paris in November 2015 demonstrate the vulnerability of the West, and repeated incidents would change common perception of threat and use of CBRN agents would again dramatically change that perception. The purpose of this section is not to provide a superficial pen-portrait of global threats, but is two-fold: 1) to examine what the term political risk means, and 2) to describe how a network approach might refine our understanding of system and threat identification and thus political risk.

The current concept of political risk is best captured by trying to make sense of strategic shocks and surprises. This form of political risk is also big business. Companies invest large sums of

money to try and make sense of the risks in countries important to their businesses (be it as places to trade or invest in), in order to make better investment decisions. Consequently, some political risk consultancies took the decision to underwrite (or shape the environment they had advised upon) during the Iraq conflict and its aftermath. The events of the so-called Arab Spring around 2011, and still being felt across the region and into Europe today, are a good example of the sort of phenomenon caught by the term political risk. In this vein the best articulation of the problems associated with contemporary understandings of political risk are caught in the question of: why did Country A suffer revolution and political upheaval, when Country B (with very similar underlying factors) did not? And this simple question opens an enormous number of subsidiary areas for inquiry. We might see one regime learning from the experience of others, and so being able to generate a different outcome. We might be able to observe different levels of government capacity and capability, different societal demographics, differing penetrations of electronic communications and social media use, and differing societal relationships and government-society social contracts. Equally we might run arguments about outside interference, pressure or help. Such things make the picture complicated, but do not amount (in themselves) to complexity (Johnson, 2009, p. 3). And it is in these initial observations of prima facie patterns that we begin to constructive our first testable hypotheses (Hayek, 1964, p. 333)

But to understand political risk one must understand what politics is. And politics is really the study of power: of who governs what, and for whom. If we borrow from physics it must be the case that power relations describe the bonds between individuals and groupings, and how those bonds bind or force away others. Thus the study of politics (and so risk) should be a more holistic exercise than it is currently. We might suggest – given that a network approach would suggest that everything is connected to everything else – that a holistic approach would add

economics and economic actors, religion, families, voluntary sector, education and so on to the usual list of political and military actors and institutions. This is because all of these influences, or input factors, impact upon political power and why people make the choices they do.[1] The aim is not just to cast the net wider, but to turn what Bunge describes as 'ordinary rational explanations' into 'scientific rational explanations: moving generalisations from extra-systemic empirical generalizations, ad hoc hypotheses or myths to systemic generalizations, that is law statements (Bunge M. , 1967, p. 12).

Importing chaos theory to politics undermines a core tenet of our understanding of politics. Because chaos theory tells us that systems tend to disequilibrium, whilst historical and political studies suggests that they tend to equilibrium.[2] If the natural and physical sciences have reached this conclusion over an extended period, then we should be curious and sceptical about why those disciplines which have humans at their core focus come to the opposite conclusion: is this due to evidence, or to assumption and confirmation bias?

It should also be noted that political risk – as an intellectual exercise – runs contrary to a great deal of academic practice. In and of itself this accounts for why much of the academic work on security, and in areas that should be of relevance to security and intelligence professionals is esoteric at best, and entirely unusable at worst. So, political risk analysis is explicitly forward-looking because we do not have risks that exist in the past, we only have risks in the future. And the future might be very near future – which we describe as 'now' – or further into the future, which we normally describe as being in the short term, medium term and so on. In studying political risk, we should be looking into the future, even if we are looking into the

recent past or deeper past for our data. This is mostly eschewed by security studies scholars who see their role as offering explanation about what has already occurred.

Political risk analysis is – therefore – predictive. Without prediction we can only suggest risk, and that means that political risk analysts are not only futurologists but scientists too. This is because scientists identify a problem and then suggest the most plausible answer to that problem based on the evidence available to them through formally constructed tests.[3] This most plausible answer – the hypothesis – guides the research design, any tests conducted within the research design and the conclusion as to whether the plausible answer was found or dismissed. Those who are not willing to advance a predictive claim, even one that is a simple as an <*if, then*> claim, are not able to offer a sense of risk. For security practitioners there is an emphasis on validating[4] empirical claims, in order to strengthen the subsequent assertion. Bunge describes these in terms of 'quasi-laws', or highly plausible generalisations which he argued would be a dramatic improvement on the state of political science as it exists today.

To achieve a better understanding of political risk, we have to (perhaps pragmatically) accept that we will need to operate with probabilities, which will drive our analysis into working with numbers, and secondly we will need to improve our practice of system identification. This latter point would illuminate an understanding that our political, economic (and social lives) are informed by and impacted by the behaviour of and interaction between networks seeking to advance their influence. Some particular features of a network approach will immediately leap out as relevant today: the attacks on Paris and, indeed, how ISIL operates is an excellent example and test case for understanding networks and how they operate to maximise their fitness for purposes: they replicate, they contain immune response systems, and they adapt.

The benefit of relating it to ISIL is that can see that we can apply it to overtly identifiable groups and but also as a way of identifying hitherto undiscovered networks. This is because the approach suggests behaviours that act as markers, from which network identification can begin to be made.

A network approach to understanding politics and political risk essentially boils down to five interconnected factors:

1) That what we are observing are networks engaged in competitive behaviours with each other.
    a. That networks seek to retain fitness for purpose and thus always seek to expand
    b. Networks engage in competition with all other networks: with allied networks they seek to make use of assets of the allied network, with adversaries they seek to undermine more directly.
    c. Networks are constantly adapting to retain their fitness for purpose. Those most able to adapt to changing circumstances are more likely to able to compete successfully.
    d. That networks seek to replicate in order to retain fitness for purpose and expansion.
    e. Networks contain an inbuilt immune response system, that allows them to respond to internal and external threats: this is analogous to a body's immune system.
2) That networks react and respond to each other, but that they operate within an environment, and whilst strong networks can bring change to environments the pace of this change is much slower than the pace of interaction between networks.

3) That individuals belong to a number of networks and loyalty to and transition between networks is often fluid and can be viewed in the same, complex fashion as politics.
4) That we can construct formal rules and equations for the concept of political power, and that power can be expressed as power 'over' or power 'to', with the latter being an expression of an ability 'to do' something, whilst the former is the power to make an entity do a specific act.
5) That contrary to the mainstream of political science and international relations, the international system does not naturally return to equilibrium or want to do so. The default position – as with observations from physical sciences – is that systems tend to disequilibrium. This fundamentally uproots one of our core understandings of politics, and thus our approach to political problems.

Applying complexity theory (and a great deal more positivism) to political risk is not simple and neither is it a quick fix to the issues of forecasting that exist in the security field. For one, moving our understanding of political risk from nation states to networks does entail greater workload, both in terms of the numbers of factors to be considered and the amount of data that would be generated. In reality a complexity approach would require machine learning to work properly, but with refinement and an engaged approach to learning and 'failing forward' that logical endpoint of this approach would not be required to provide robust and valuable predictions and observations. Understanding that these risks are complex and multifaceted does bring into sharp relief the second section of this chapter, which is the law as a set of tools by which states control and manage the risks they face in the international system.

International Law and Extraterritorialisation[5]

Law functions to provide process and procedure to address and mitigate disputes. Legal codes exist to provide clarity of definition, certainty of process and outcomes and to provide redress to injured parties. As with all political functions, the strength of a legal code is often dependent upon the authority governing it being seen to be able to enforce its judgements, and this challenge is particularly acute in with international law. We can see the effect of enforceability with an example from domestic political-legal power, namely taxation, which illustrates this point simply. The two ways of expressing political power are 'to' and 'over'. That is a person or institution has the power to do something that causes a change. In other words, power is causing a change in a third party by doing something that we can identify, which leads to an outcome that would not have happened without the action. In the case of power 'over' someone, the source of power only wields that power over the third party if they can make that party do or not do a specific act. This might be an implied power: the implied punishment that can be generated by a tax authority, for instance, compels people to comply with the tax code. But we know – instinctively – that if the tax authority had very little ability to see that an individual or business was cheating the tax system, and even less ability to leverage punishment upon the individual for the transgression then we are likely to see a lower rate of compliance. Conversely where the balance of resources is loaded in favour of the tax authorities we should see higher rates of compliance (this is also borne out by the empirical data).[6]

In the case of personal taxation there are various thresholds of non-compliance across the EU that might trigger an investigation by the tax authorities. So, in jurisdictions where the authorities do not trigger an investigation for sums less than €20k EURO we might view the resources of governments as being sufficiently degraded that will lead to a minor modification

to the tax cheating wherewithal of the individual so that they are more likely to act to defeat the aims of the tax code. This in turn would bring in a requirement for psychological and sociological evidence about the individual to further assess their disposition to cheating and so on. Adopting this formalised approach allows us to make a prediction about the individual and other individuals, that can be refined in the light of further evidence. It is clear to see how these somewhat margin insights about tax actually run more widely to incorporate other forms of transgressive behaviour, including those of terrorists. In terms of international law, which is divided into 1) public international law, governing the relationships between states and international entities (so, traditionally the law of the sea, international criminal law, the laws of war, human rights law, laws of migration and refugee status), 2) private international law, which governs conflicts between legal codes – so which territory and court may hear a case, or which legal code applies in any given situation, and 3) supranational law, which Europeans would understand most readily as EU law, where a state has voluntarily ceded sovereignty to have that element of law determined at the supranational level.

We are primarily concerned here with public international law, and we can observe that within this discreet set of disciplines within international law, they are only as strong as their enforcing authorities. The Geneva conventions, which cover armed conflict, torture, the rights of civilians in war, proportionality, the use of chemical and biological weapons and so on, are enforced by all states parties who are signatories to the Conventions. The principle of universality applies to the Conventions, which means that wherever the crime is committed any signatory nation can prosecute an individual if they land in their territory: the crime does not need to have occurred in the prosecuting territory. This should provide no shelter to war criminals, but we can observe that in reality this is not the case even if in the aftermath of the Yugoslavian Civil War, some alleged perpetrators of war crimes have been prosecuted. Similarly, the

International Criminal Court – which covers genocide, war crimes and crimes of aggression and which began its work in July 2002 – has endured a difficult opening decade attempting to bring alleged war criminals to justice, and often just to trial. Of the 39 indicted to the Court, only one has been convicted, and the majority are still at large, or have died prior to trial commencing. There are also strong questions around whether western leaders would ever find themselves before the Court, raising questions about an implied bias within the Court. An uneven implementation of the law, and frequent and consistent flouting of international legal codes fundamentally undermines a legal code. The gnarly question of extrajudicial killing, which both the US and UK have engaged in, in the Middle East – might be justified with reference to domestic and UN codes, but has yet to be tested in court. The reality is that this is highly unlikely to be tested in any court (certainly outside of a domestic court) and reinforces the notion that we should focus in on political power, rather than a strict adherence to and reading of legal codes.

Within communications law there is similar legal unevenness: the revelations from the American National Security Agency's former employee, Edward Snowden, revealed an industrial scale effort from US (and British) signals intelligence agencies to intercept and analyse voice and internet communications across the globe. These revelations are said to have degraded the west's efforts to push back against radical jihadist groups, including those with a connected presence in Iraq, Syria and Western Europe, whilst also providing embarrassing evidence of some sharp diplomatic practice by the Americans against allies, such as Germany and France. The penalties for the American and British authorities for these practices were purely political. Attempts at changing various domestic laws to effectively criminalise American and British interceptions are still ongoing, but will still suffer from problems with enforcement.

The European Court of Human Rights (based in Strasbourg, and not a constituent part of the EU) has been far more effective in protecting the rights of individuals against state infractions, and one measure of this is how often the Court is criticised by individual states for its 'interference' in domestic matters. The judgements of the ECHR are directly enforceable in Member States, and some states parties – including the UK – have incorporated the ECHR into national law, which should reduce the flow of cases having to proceed out of domestic courts to Strasbourg. There are regional versions of the Court around the world, notably the African Court on Peoples and Human Rights, and the Inter-American Court on Human Rights.

Whilst in trade and commerce, various tariffs and restrictive practices are routinely observed and cases brought from across the international system to the World Trade Organisation. Whilst penalties are occasionally levelled and disputes are resolved through negotiation we can still observe that there are substantial infractions that are effectively immune from legal attention and effective redress. In the case of China – to choose one example - not only are Chinese government (or government sponsored) organisations accused of stealing trade secrets, and intellectual property from western rivals, they are also accused of flooding western markets with poorly reproduced replicas. The internationally recognised system of patents and intellectual property law was devised to protect the endeavour of – mostly – western nations during and after the industrial revolution and thus to lock in western prosperity and market dominance. The modern Chinese government appears to condone and arguably sponsor a counter-cultural movement that seeks to raise the profile and profitability of Chinese manufacturing interests in a way that flouts these laws, which we in the west assume to be universal laws. Chinese resistance to international trade law is purely because of its market and

geographical size: in the international system money (and military capabilities) are power. And that is one of the key issues with law and security, there is little in the way of enforceable law and therefore it is more important to look at issues of power.

Within the international system, and particularly the United Nations, there is a complex system of sanctions and penalties that can be placed upon states who behave in a rogue manner. But often the formulation of UN sanctions is frustrated by the schism that exists in the Permanent Five members of the UN Security Council, with China and Russia often dissenting or flat-out blocking measures proposed by the US, UK or France. Consequently, we can observe developing areas of public international law where powerful states seek to assert the primacy of their law over third countries. This is in part a reflection of the failure of public international law, and in part a reflection of strong states seeking to manage the risks they are facing in the international system, in a way they control. There is, however, a general principle in international law that one state cannot impose legal measures on another state, through the enforcement of national laws without the consent of the latter: this is where the core issue of sovereignty comes into play. There have been intense protests and complaints from third party states where extraterritorial laws have been asserted. The primary means by which those enacting extraterritorial laws have tried to enforce them has been through economic and diplomatic levels to seek compliance.

To illustrate the emerging pattern of extraterritorialisation, this chapter focuses on the successful example of the United States' sanctions regime against Iran. Only in January 2016 can we describe this sanctions regime as contributing to the successful containment of the Iranian nuclear programme, and in generating sufficient pressure to see the re-entry of Iran into

the mainstream of the international system. (Khalaf, 2016) Outside events also contributed to this situation. The need to seek a resolution to the civil war in Syria, and with it the need to arrest the growth of the so-called Islamic State group has seen Iran re-emerge as a pivotal nation in these efforts. Additionally, it should be noted that the international sanctions regime relating to Iran was entirely aligned to the US view, and that the reason for this was largely due to the extraterritorialisation of US domestic law, and – more importantly – that these measures were politically underwritten by the Executive.

The rules, as they stand internationally, around extraterritoriality were initially created with reference to criminal law, and have then later developed into other areas of law. This initially led to rulings which asserted that a court may exercise jurisdiction where a crime is committed, which is now universally recognised (Brownlie, 2008, p. 301). The key concept in the area is the 'objective territorial principle' (Harris, 2010, p. 228). This principle means that a state should be able to assert jurisdiction only if the offence has been committed, in part or in whole, in its territory. Jurisdiction is found when any essential constituent element of a crime is consummated on a state territory. The objective principle received wider support following the 1927 *Lotus* case that arose out of collision on the high seas between a French steamer and a Turkish collier, in which the latter sank leading to deaths of Turkish crew members (The Lotus Case, 1927, p. 20). Turkey tried and convicted French officers on the watch of involuntary manslaughter. France contended that the flag state of the vessel alone had jurisdiction over acts performed on board on the high seas, so in effect the boat was floating French territory. The Court rejected the French arguments by stating that the territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty. The Permanent Court of International Justice, which has been replaced by the

International Court of Justice, decided Turkey was free to exercise jurisdiction over the French sailors (The Lotus Case, 1927, p. 23).

The protective principle determines jurisdiction by reference to the national interest injured by the offence, and this principle is increasingly invoked by Western states seeking solutions to the problem of terrorist activity emanating from outside their jurisdictions. As Brownlie notes, nearly all states assume jurisdiction over aliens for acts done abroad, which affect the security of the state (eg (Nusselein v Belgian State, 1950). The principle of universality determines jurisdiction by reference to the custody of the person committing the offence. A number of nations have adopted the principle allowing jurisdiction over acts of non-nationals where the crime, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy (Brownlie 2008, 305).[7] The universality principle was first recognized in *Eichmann* (Attorney General of the Government of Israel v Eichmann , 1961). In this case, Israel established its jurisdiction to try Adolf Eichmann, who had been a German SS officer, and a key facilitator of the Nazi holocaust, based on the law of nations. The court held that

> [t]he State of Israel's 'right to punish' the Accused derives […] from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault its existence (Attorney General of the Government of Israel v Eichmann , 1961, pp. 30-31).

This universality principle has been applied to alleged and then convicted war criminals ever since the Eichmann case in an expanding range of serious offences. Further precision to this

principle has been found in cases such as *Sosa v. Alvarez-Machain* (Sosa v. Alvarez-Machain, 2004) where a claim for damages as a result of unlawful abduction was upheld on the basis of a universality principle. The *Sosa* case was in the civil, not criminal law but the US Supreme Court decided that the civil nature of the claim did not prevent it from establishing the offending act had been universally recognised by international law and thus was actionable in the US (Harvard Law Review, 2010-11, p. 1229) (Sosa v. Alvarez-Machain, 2004, pp. 732-733). The passive personality principle determines jurisdiction by reference to the nationality or the national character of the person injured by the offence, allowing states to prosecute offences that do not occur within their jurisdiction (Harris 2010, 239). This now provides for terrorist or preparatory acts and other matters of general concern, which is an increasingly wide set of infractions, to be prosecuted.[8]

In terms of providing the intellectual building blocks and context to the Iranian sanctions example given below, it should be noted that the US developed its stance towards extraterritorialisation partly in the context of anti-trust legislation which often involves a process which, though formally 'civil', is in substance coercive and penal (Brownlie, 2008, p. 300). US courts often exercise extraterritorial jurisdiction under the anti-trust law based on the extension of the objective territoriality principle, applying the so-called 'effects doctrine', which provides for the jurisdiction based just upon the 'effects' that acts of foreign companies committed abroad may have in the US, which has seen UK bankers extradited to the US to face lengthy jail terms for offences entirely committed in the UK.[9] Many states object to such an extension of jurisdiction (Harris, 2010, pp. 227-8). A number of scholars have criticised the 'effects doctrine', given that the 'offences' have occurred entirely outside of the prosecuting authority, and in some cases the injury could not be foreseen in the prosecuting state: an invidious state of affairs (Harris, 2010, p. 195). The European angle on these questions is

somewhat different to the American approach. The European Court of Justice (ECJ) in the so called *Wood Pulp* case argued that international law permitted a state to apply its competition laws to acts done by foreigners abroad if those acts had direct, substantial and foreseeable effects within the states concerned. Importantly for the development of this area of law and for states seeking to control their risks the decisive element is where the activity is implemented, not formulated (Shaw, 2008, pp. 695-6).

The 2000s were a decade of military interventions, in which Western powers were often accused of going to war too readily. In this area extraterritorialisation was used to impose obligations on states. The International Court of Justice, for example, has explicitly examined the extraterritorial scope of human rights treaties in two cases, which both concerned territories occupied by outside forces (Ryan & Mitsilegas, 2010, p. 76). In the 2004 Advisory *Wall* Opinion, the Court affirmed Israel's responsibility for military activities in the Palestinian territories not only under international humanitarian law, but also under international human rights law (Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004). In the 2005, the Court held in the case *DRC v. Uganda* that Uganda was 'the occupying power' in one of the DRC's regions because Ugandan forces in the DRC substituted their own authority for that of the DRC. Thus, Uganda, as an occupying power, had substantial positive obligations under international law, which included the duty to secure the respect for the applicable rules of international human rights humanitarian law by other actors present in the occupied territory (Case Concerning Armed Activities on the Territory of the Congo (DRC v. Congo), 2005, p. 178). This is a contested area however. In a European Court of Human Rights case concerning the Yugoslavian civil war, the court decided that any extension to jurisdiction should be only in exceptional circumstances, whereas in the

Al-Skeini case (Al-Skeini v the United Kingdom, 2011) the obligations of the British government extended over the parts of Iraq that they were militarily responsible for at the time. In other words, the occupying power takes on domestic law obligations for occupied territories, which in turn imposes significant obligations upon those powers, and can be partly seen in the transformation of US and allies in Iraq in 2003 from a fighting force to a counterinsurgency force, with different rules of engagement, engaged in state reconstruction.[10]

Case Study: The US Sanctions on Iran 2006-2016

The sanctions regime placed on Iran by the US was the culmination of testy diplomatic relations between the two nations following the 1979 revolution in Iran and the installation of the theocracy who cited the US as one of their implacable adversaries. The legal and political measures taken by the United States against Iran have been targeted at creating three main effects: 1) the halting of the Iranian regime's efforts to acquire a militarised nuclear capability and – latterly - to frustrate the acquisition of sophisticated conventional weapons, 2) to promote western style modes of governance and equality norms within Iran and 3) to try and curtail Iran's support for organisations and political ends that run contrary to the core national interests of the United States and their allies. The legislative actions examined within this section all contain an extraterritorial component, based on US legislators' beliefs that non-proliferation and democratic governance norms are universally applicable. The conflicts against Afghanistan and Iraq were – in part – fuelled by these beliefs, which were encapsulated by the now dissolved neoconservative think-tank, the New American Century. This case study provides a clear example of how extraterritorialisation works and how it can be successfully used by states to advance their diplomatic goals or reduce the risks they face in the international system.

The sanctions regime against the Iranian government was encapsulated by three pieces of law, which served as a ratchet effect on the Iranian government and its allies:

- **Iran-Libya Sanctions Act 1996**, latterly the **Iran Sanctions Act 2006** – this imposed financial and practical sanctions on non-US entities that carried on trade with the Iranian energy industry. The aim of the act was to throttle off demand to the Iranian energy sector, and by extension the Iranian economy, and so bring Iranian negotiators in a position of weakness to the negotiating table over nuclear weapons programmes. This act was, in turn, extended by the **Comprehensive Iran Sanctions, Accountability and Divestment Act 2010**, which put in place a statutory framework for investigation and action against suspected companies.

- **Iran Freedom Support Act 2006** – this imposed sanctions and non-cooperation with US sources of capital and diplomacy in the event of a third country assisting Iran. This meant – in effect – that any country positively engaging with Iran was excluded from the US economy: a penalty significant enough for most to deter cooperation with Iran. The act – controversially, outside of America - also allowed the US President directly invest in non-violent political movements in Iran who are also seeking to shift Iran into a transition to western style governance norms, again an extension of the New American Century politics. The act was superseded and extended by the **Iran, North Korea and Syria Sanctions Consolidation Act 2011**, which placed even heavier sanctions on those assisting the Iranian energy sector and provided the framework through which the President assisted non-US countries in finding non-Iranian energy suppliers.

- **Iran Non-Proliferation Act 2000** (superseded by the **2006 Iran, North Korea, Syria Non-Proliferation Act**) – placed heavy diplomatic penalties on third countries making contributions or providing assistance to Iranian weapons programmes (either to programmes involving weapons of mass destruction, or those involving sophisticated conventional weaponry). The act also allows the US President to seize the assets of entities in breach of the act and to prevent them trading with the US.

Iran-Libya Sanctions Act (amended in 2006 to the Iran Sanctions Act)

The 2006 Iran Sanctions Act (ISA) was probably the most important element of the US sanctions regime against Iran. The ISA placed penalties and sanctions upon entities outside of the US if they breached the prescriptions in the Act, which was – after all – domestic US law. So, whilst the US could not prosecute those outside of the US, it could coerce their compliance by restricting access to markets and US financing. Using these implicit tools, the US was able to bring a large number of third countries in behind the unilateral sanctions regime. Interestingly, a large number of the businesses impacted by the ISA were in countries allied to the US, including many European businesses and multinational oil companies – so this co-option was not just targeted as weak nations but also some heavily developed and affluent nations too. In terms of who was caught by the ISA provisions, four European oil concerns (the fourth was the Norwegian Statoil, which has preferential European trading rights) were given extra time to comply: these were Total of France, ENI of Italy, and Royal Dutch Shell of the UK and Holland. In 2011, three European companies were sanctioned by the US President for infractions of the ISA. [11]

The various iterations of the ISA aimed to restrict the resources Iran had available for its nuclear programme and for its well-known efforts in supporting enemies of Israel (America's key strategic ally in the region) such as Hezbollah, Hamas, and Palestine Islamic Jihad. The protection of Israel has remained a key foreign policy priority for the US for over 50years, although interestingly the Obama Administration's decision to negotiate with Iran was done in the face of opposition by the Israeli government (and that of another US ally, the Saudi regime). The ISA targeted the Iranian energy industries, of which the petroleum sector generates about 20% of Iran's GDP (which is about €670 billion), as well as 80% of its exports. The oil fields in Iran are mature and thus increasingly expensive to exploit but Iran's re-entry into the mainstream of the international system immediately saw them contributing 500,000 barrels of oil a day into the oil markets, further suppressing price. Removing sanctions from Iran also helpfully introduces a counterbalance into the gas market, where Russia was taking on a dominant position in the absence of Iranian supplies.

Iran Freedom Support Act 2006

The *Iran Freedom Support Act 2006 (IFSA)* was controversial because it borrowed from elements of thinking that had been seen in the lead up to the 2003 Iraq war. The Act allowed the President to provide $75million of support to non-violent transformative programmes in Iran (the United States will 'support efforts by the people of Iran to exercise self-determination over the form of government of their country') to overthrow the theocratic regime. This was rightly seen by governments in the Middle East as neo-imperial meddling, but from the US perspective as the assertion of a universal norm. The US government retained a belief that democracies were inherently stable, whilst revolutionary dictatorships contributed to instability: this was to be proved to be occasionally incorrect in the aftermath of the 2011 Arab Spring when newly formed democracies proved to be very unstable political entities. The Act

gives further voice to the US opposition to sophisticated conventional weaponry being transferred to Iran – this is in line with established US preferences to avoid destabilizing arms transfers to a region.

Iran Freedom Support Act 2006, provided a flexible framework under which sanctions could be applied to non-US entities assisting Iran in acquiring and advancing a sophisticated weaponry programme, and in 2011 this was extended to include homeland security technology which lowered the technology lower bar, and similarly there was now a bar on assisting the development of the Iranian energy sector. This flexibility was a judicious piece of drafting because the terms of s.401 caught the Chinese government, and so a strict interpretation of this act would have forced the American government to severely constrain its ties with a key trading partner, albeit one with whom it has enduring tensions. These provisions had the tangible effect and unintended consequence, between 2006 and 2009, of temporarily ending the collaboration between the US and Russian space agencies over the International Space Station because Russian rocketry technology had been used both at the Space Station but also within Iran's missile programme (Mizin, 2004). Another awkward possibility was with the quasi-sanctioned actions of government actors within a state. When the Pakistani nuclear scientist, AQ Khan, was selling nuclear technologies to North Korea, and Iran (amongst others) he was doing so as someone funded within the Pakistani government nuclear programme, but without the express authorisation of government (Corera, 2006). Under those circumstances, another allied country – in this case Pakistan – would have proved themselves to be an awkward example, and this is one of the key dangers of extraterritorialised law: under normal sanctions regimes states parties have signed up to the provisions, under extraterritorial arrangements, they have not.

The 2012 *Iran, North Korea, and Syria Sanctions Consolidation Act (S. 1048)* not only consolidated the existing legislation but began a drift towards unifying the US and European approach to the question of Iran. (Iran, North Korea, and Syria Sanctions Consolidation Act, 2012) The 2012 Act moved the two regimes more closely into line, allowing a little civilian trade – which was important to European car manufacturers – to occur, whilst also allowing for further ratchets to be applied. This consolidation Act tightens up some of the provisions from the existing legislation, with significant extensions into the area of homeland security technology and into assisting states with moving away from Iranian energy imports, something again targeted to significantly damage the Iranian economy. Within this consolidation bill there is still the scope for civilian trade with Iran, and so there is room for a further ratcheting of measures in future bills. This consolidation bill can also be seen as evidence of further convergence between the EU and US, as there is now significant overlap between the two sanctions regimes, but it does also demonstrate how the US uses extraterritorial legislation to give additional weight to its diplomatic positions.

The extraterritoriality of these Acts is based upon the US assertion of a principle of universality. This is politically problematic because whilst genocide does clearly affront a universal norm (the *Eichmann principle*), possession of nuclear weapons and autocratic rule does not. What the US has asserted is that its political sensibilities and security necessities should prevail. The powers given to the President by the various acts were wide-ranging, and allowed him to take strong action against individuals and businesses who had substantial dealings with Iran, something that would likely pull all bar a tiny minority of businesses and individuals into line. The unintended consequence of this extraterritoriality was to require flexibility in dealing with the Chinese government to avoid taking punitive action against an important partner, and in

ending cooperation with Russian space agencies for a time. But whilst the measures were not explicitly aimed at states parties, the effect was to bring the EU closer and closer to the US position, producing – in effect – a unilateral sanctions regime.

Whilst we might observe that Iran returned to the international mainstream in January 2016 because of the unfolding situation in Iraq and Syria, and in response to the need for Saudi Arabia and Iran to find common ground to arrest the development of the Islamic State group, it is also the case that the United States' unilateral sanctions regime affected by extraterritorialised law was an effective tool of political compliance. Given that it was successful in even pulling the European Union into line, it is sure to be repeated not only by the US, but by the EU, China and other politically capable international powers. Controlling risk unilaterally is something that states have always felt comfortable doing, this is another tool in that armoury.

Summary

Political risk is an area in which governments and private risk consultancies have a significant advantage over academia. This is in part due to the amount of time that practitioners are able to devote to the subject and the instrumental ends to which they can put their work. The scholarly field has shied away from adopting the lessons from natural sciences, which are common in practitioner fields. Consequently, much of the scholarly work in this area fails to provide testable claims or prediction. That is a missed opportunity for scholars to prove that the work they do has traction in 'the real world', and also deprives the field of the considerable advances in method and data analysis techniques we could reasonably expect would result. In

terms of risk, security and international law, this chapter re-emphasised the well-known problems with public international law and sanctions regimes. Instead it focused on an emerging area of law, where states are seeking to mitigate their risks by seeking to enforce their domestic law internationally. In the section covering extraterritoriality, we were able to see that the US was able to successfully leverage their domestic law (which was in effect a sanctions regime) over Iran and third parties using diplomatic and economic coercion. We were also able to conclude that whilst the sanctions regime had placed considerable pressure upon the Iranian government and those seeking to trade with them, ultimately the Iranians had come back to the negotiating table due to the widening conflict in the Middle East that is still threatening to consume Syria and Iraq. Indeed, a plausible reading of the return of Iran to mainstream diplomatic circles is that America needs Iran (and its persuasive powers in the region) more than Iran needs the end to American sanctions. As with much in the international system, power and influence prevails.

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[1] Confirmation of empirical evidence and of hypotheses is subject to a great weight of academic material. The key critique of many academic disciplines is the weakness of the empirical data to the conclusion. See: (Bunge M. , 1967, pp. 315-328)

[2] If we look at chemistry, as a discipline, then we learn that maintaining equilibrium or stasis consumes far more energy than disequilibrium to the point where chemists assert that the natural order is that of disequilibrium.

[3] Bunge points out in his earlier work that historically drawn prediction has 'little or no test value' because we cannot test what would have happened in the absence of the forecast (Bunge M. , 1967, p. 93)

[4] Scientific realists would prefer the term confirming to validating.

[5] The extraterritorialisation element of this chapter is built upon an earlier paper that Justin Frosini and I wrote for the European Parliament (Dover & Frosini, 2012).

[6] This can be formally expressed for us to test as: $P(a,c) = X[R(a) - R(c)]$ (The equation is adapted from ((Bunge M. , 1998, p. 160). That is power (P) is exercised by *a* over *c,* leading to the outcome *X*, when the resources of *a* are superior to *c*. And this common sense example, expressed formally, allows us to test it in relation to different scenarios

[7] For example, In June 2003, a Spanish judge exercised jurisdiction based on the universality principle, over Ricardo Miguel Cavallo, a former Argentine naval officer, who was extradited from the UK to Spain pending his trial on charges of genocide and terrorism relating to the rule of the Argentinian Junta.

[8] For example, 1963 Tokyo Convention on Offences Abroad Aircraft, art 4, 1984 Torture Convention. The Alcoa case (US v. Aluminium Company of America and others, 1945, p. 416) decided by the US court in 1945, introduced the effects based doctrine. The court somewhat contentiously considered it a 'settled law' that "any state may impose liabilities for conduct outside its borders that have consequences within its borders." (US v. Aluminium Company of America and others, 1945, p. 443)

[10] As per the ruling: (Coard et al. v. the United States, 1999, p. 37)

[11] For the full account of the evidence behind the penalties see: (US State Department, 2011)